No. 94-1311

FILED
MAR 13 1995
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1994

STATE OF CALIFORNIA, STATE OF NEVADA AND TAHOE REGIONAL PLANNING AGENCY,

Petitioners,

v.

TAHOE SIERRA PRESERVATION COUNCIL, ET AL.,

Respondents.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

PETITIONERS' REPLY BRIEF

DANIEL E. LUNGREN
Attorney General of the State of California
RODERICK E. WALSTON
Chief Assistant Attorney General
JAN S. STEVENS
Assistant Attorney General
*RICHARD M. FRANK
Supervising Deputy Attorney General
CARLA CARUSO
Deputy Attorney General
1515 K Street
Post Office Box 944255
Sacramento, California 94244-2550
Telephone: (916) 445-8178

Attorneys for Petitioner State of California

*Counsel of Record

FRANKIE SUE DEL PAPA
Attorney General of Nevada
KENT B. HANSON
Deputy Attorney General
333 West Nye Lane
Capitol Complex
Carson City, Nevada 89710
(702) 687-7322

Attorneys for Petitioner State of Nevada

R.J. NICOLLE, ESQ.
SUSAN E. SCHOLLEY, ESQ.
Tahoe Regional Planning Agency
P.O. Box 1038
Zephyr Cove, NV 89448
(702) 588-4547

Attorneys for Petitioner Tahoe Regional Planning Agency

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

BEST AVAILABLE COPY

TABLE OF CONTENTS

Page

I. THIS CASE PRESENTS A DIRECT INTER-CIRCUIT CONFLICT REGARDING THE APPROPRIATE STATUTE OF LIMITATIONS TO BE APPLIED IN LITIGATION ARISING UNDER AN INTERSTATE COMPACT 1

II. CONTRARY TO RESPONDENTS' CLAIMS, THE TAHOE REGIONAL PLANNING COMPACT'S 60-DAY STATUTE OF LIMITATIONS IS DIRECTLY APPLICABLE IN THIS LITIGATION 3

III. RESPONDENTS INEXPLICABLY CONFUSE PRINCIPLES APPLICABLE TO "PHYSICAL INVASION" CASES WITH THE DISTINCT RULES PERTAINING TO REGULATORY TAKINGS LITIGATION SUCH AS THE PRESENT ACTIONS 5

IV. RESPONDENTS MISPERCEIVE *WILSON V. GARCIA*'S APPLICABILITY TO THE PRESENT CASE 7

TABLE OF AUTHORITIES

Page

CASES

American Pipe & Construction Co. v. Utah, 414 U.S. 538 (1974) 4

Culyer v. Adams, 449 U.S. 433 (1981) 7

DeAnza Properties X, Ltd. v. County of Santa Cruz, 936 F.2d 1084 (9th Cir. 1991) 6

DelCostello v. Teamsters, 462 U.S. 151 (1983) 7

Edwards v. Fresno Community Hospital, 38 Cal.App.3d 702, 113 Cal.Rptr. 579 (1974) 4

Gibson v. United States, 781 F.2d 1334 (9th Cir. 1986) 8

Harper v. Virginia Dept. of Taxation, ___ U.S. ___, 113 S.Ct. 2510 (1993) 8

Hensler v. City of Glendale, 8 Cal.4th 1, 876 P.2d 1043, 32 Cal.Rptr. 244 (1994), cert. denied ___ U.S. ___, 63 U.S.L.W. 3628 (1995) 4, 6

Hess v. Port Authority Trans-Hudson Corp., ___ U.S. ___, 115 S.Ct. 394 (1994) 1, 2

Hess v. Port Authority Trans-Hudson Corp., 809 F.Supp. 1172, aff'd, 8 F.3d 811 (3d Cir. 1994) 2

James B. Beam Distilling Co. v. Georgia, 501 U.S. 529, 111 S.Ct. 2439 (1991) 8

Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470 (1987) 6

Mason v. Schaub, 564 F.2d 308 (9th Cir. 1977) 8

Ocean Acres Ltd. Partnership v. Dare County Bd. of Health, 707 F.2d 103 (4th Cir. 1983) 6

TABLE OF AUTHORITIES – Continued

Page

Patrick Media Group, Inc. v. California Coastal Commission, 9 Cal.App.4th 592, 11 Cal.Rptr.2d 824 (1993) 6

Petty v. Tennessee-Missouri Bridge Comm., 359 U.S. 275 (1959) 7

Pierpont Inn, Inc. v. State of California, 70 Cal.2d 282, 449 P.2d 737, 74 Cal.Rptr. 521 (1962) 5

Rao v. Port of New York, 122 F.Supp 595 (E.D.N.Y. 1954), aff'd, 222 F.2d 363 (2d Cir. 1955) 2, 3

United States v. Dickinson, 331 U.S. 745 (1947) 5

Walsh v. Port Authority Trans-Hudson Corp., 813 F.Supp. 1095 (D.N.J. 1993), aff'd sub nom. 8 F.3d 811 (3d Cir. 1993) 2

Wilson v. Garcia, 471 U.S. 261 (1985) 7, 8

Yee v. City of Escondido, 503 U.S. 519, 112 S.Ct. 1522 (1992) 5

UNITED STATES CONSTITUTION

Eleventh Amendment 7

STATUTES

Title 42, United States Code § 1983 .....7, 8

Central Interstate Low-Level Radioactive Waste Compact, P.L. 99-240, Article IV(l) (1986) 3

Central Midwest Interstate Low-Level Radioactive Waste Compact, P.L. 99-240, Article III(q) (1986) 3

Columbia River Gorge Compact, 16 U.S.C. § 544m(b)(4) (1986) 3

TABLE OF AUTHORITIES – Continued

Page

Federal Employers' Liability Act, 45 U.S.C. § 56..... 2

Midwest Interstate Low-Level Radioactive Waste Compact, P.L. 99-240 (1986), Article III(o)..... 3

Northeast Interstate Low-Level Radioactive Waste Management Compact, P.L. 99-240 (1986), Article IV(o)..... 2

Tahoe Regional Planning Compact, Article VI(j)(4)..... 3

OTHER AUTHORITIES

Federal Rules of Civil Procedure, Rule 23..... 4

Schwartz & Kirklin, Section 1983 Litigation: Claims, Defenses and Fees, § 12.10 (John Wiley & Sons, 2d ed.) (1994 Supp.)..... 8

PETITIONERS' REPLY BRIEF

I.

THIS CASE PRESENTS A DIRECT INTER-CIRCUIT CONFLICT REGARDING THE APPROPRIATE STATUTE OF LIMITATIONS TO BE APPLIED IN LITIGATION ARISING UNDER AN INTERSTATE COMPACT.

Respondents maintain that the decision below fails to present a conflict with the decisions of any other circuit. (Brief in Opposition at 21-22.) Respondents' view is wholly inaccurate.

The first question presented in the Petition is "[w]hether, in litigation brought under an interstate compact to challenge government regulations adopted under the terms of that compact, the applicable limitations period should be drawn from the express provisions of the compact itself rather than from other state or federal law." (Petition at i.) Respondents, significantly, have not seen fit to take issue with or attempt to re-frame that question in their Brief in Opposition.

Respondents have apparently misread the authorities from the Second and Third Circuits cited by Petitioners. As noted in the Petition, a principal source of the current inter-circuit conflict is the litigation which culminated in *Hess v. Port Authority Trans-Hudson Corp.*, ___ U.S. ___, 115 S.Ct. 394 (1994). Respondents are correct in noting that this Court's decision in *Hess* dealt exclusively with an issue (i.e., the Eleventh Amendment) separate and apart from the statute of limitations question. What respondents overlook, however, is the fact that the antecedent decisions of the district courts, affirmed by the Court of

Appeals for the Third Circuit, *did* address the same statute of limitations issue raised in Petitioner's first Question Presented. (*Walsh v. Port Authority Trans-Hudson Corp.*, 813 F.Supp. 1095 (D.N.J. 1993), *aff'd sub nom.*, 8 F.3d 811 (3d Cir. 1993); *Hess v. Port Authority Trans-Hudson Corp.*, 809 F.Supp. 1172, *aff'd*, 8 F.3d 811 (3d Cir. 1994).) Moreover, both courts resolved the issue directly contrary to the decision of the Ninth Circuit, i.e., by adhering to the one-year limitations period expressly contained in the interstate compact and by rejecting the argument that another, lengthier federal statute of limitations should be applied due to the nature of the cause of action there sued upon (the Federal Employers' Liability Act, 45 U.S.C. § 56).

Respondents' efforts to distinguish away the decision in *Rao v. Port of New York*, 122 F.Supp 595, 597 (E.D.N.Y. 1954), *aff'd*, 222 F.2d 363 (2d Cir. 1955), are equally unavailing. While the Eleventh Amendment was again one issue presented in *Rao*, the other key question adjudicated there – the one which places the Second Circuit squarely in conflict with the Ninth Circuit – is whether the bistate compact's express 12-month statute of limitations supersedes a longer limitations period sought to be imported from sources external to the compact itself.[1]

---

[1] Respondents repeatedly suggest that the Tahoe Regional Planning Compact's 60-day statute of limitations is unique in its brevity, and therefore presents some type of legal aberration. Any such perception is demonstrably incorrect. Many of the other interstate compacts potentially affected by the decision below, particularly those of recent vintage, similarly have comparably short limitations periods. See, e.g., Northeast Interstate Low-Level Radioactive Waste Management Compact, P.L.

Like the Third Circuit, and contrary to the Ninth Circuit, the Second Circuit answered that question in the affirmative in *Rao*. (222 F.2d at 363.)

Respondents' efforts to evade the inter-circuit conflict presented with respect to Petitioners' first Question Presented are therefore without merit.

II.

CONTRARY TO RESPONDENTS' CLAIMS, THE TAHOE REGIONAL PLANNING COMPACT'S 60-DAY STATUTE OF LIMITATIONS IS DIRECTLY APPLICABLE IN THIS LITIGATION.

Respondents further contend that the 60-day statute of limitations expressly set forth in the bistate Tahoe Regional Planning Compact is "clearly inapplicable" to their regulatory takings claim. (Brief in Opposition at 12-13.) That view is singularly incorrect, as demonstrated by the plain language of the Compact itself.

Article VI(j)(4) *expressly provides* that *any* "legal action arising out of the adoption . . . [of TRPA's] regional plan or of any ordinance . . . shall be commenced within 60 days . . . " Respondents have, in fact, brought a facial

---

99-240 (1986), Art. IV(o) (60-day statute of limitations); Midwest Interstate Low-Level Radioactive Waste Compact, P.L. 99-240 (1986), Art. III(o) (same); Columbia River Gorge Compact, 16 U.S.C. § 544m(b)(4) (1986) (60-day limitations period for litigation brought under Oregon-Washington compact modelled on Tahoe Regional Planning Compact); Central Interstate Low-Level Radioactive Waste Compact, P.L. 99-240, Art. IV(l) (1986) (60 days); Central Midwest Interstate Low-Level Radioactive Waste Compact, P.L. 99-240, Art. III(q) (1986) (same).

challenge to the validity of TRPA's regional plan and certain precursor ordinances. It is difficult to comprehend a lawsuit which more directly implicates the Compact's stated limitations period than does the present litigation.

Recently, a unanimous California Supreme Court rejected precisely the same theory advanced by respondents here. In *Hensler v. City of Glendale*, 8 Cal.4th 1, 876 P.2d 1043, 32 Cal.Rptr. 244 (1994), *cert. denied*, ___ U.S. ___, 63 U.S.L.W. 3628 (1995), a landowner unsuccessfully sought to evade application of a relatively short state statute of limitations pertaining to litigation challenging local land use decisions. The court in *Hensler* spurned the landowner's claim that inverse condemnation claims were somehow exempt from the statutory limitations period, finding that period applicable no matter what the form of the action. (8 Cal.4th at 21-28, 876 P.2d at 1056-1061.)[2]

---

[2] Respondents' citations to the contrary are unpersuasive. *American Pipe & Construction Co. v. Utah*, 414 U.S. 538 (1974), dealt simply with the relationship between a federal antitrust statute of limitations and the class action rules set forth under Rule 23 of the Federal Rules of Civil Procedure. *Edwards v. Fresno Community Hospital*, 38 Cal.App.3d 702, 113 Cal.Rptr. 579 (1974), concerned the applicable state limitations period in private litigation over a hospital's revocation of a doctor's use privileges. The California court of appeal there held that the revocation implicated a "property right" rather than a "personal right" for state law limitations purposes. And in *Hensler, supra*, the California Supreme Court recently invoked the same rule cited by Respondents in *Edwards* to find a 90-day statute of limitations for litigation challenging government land use decisions fully applicable to a landowner's regulatory takings claim. 8 Cal.4th at 22-27, 876 P.2d at 1057-1061.

III.

RESPONDENTS INEXPLICABLY CONFUSE PRINCIPLES APPLICABLE TO "PHYSICAL INVASION" CASES WITH THE DISTINCT RULES PERTAINING TO REGULATORY TAKINGS LITIGATION SUCH AS THE PRESENT ACTIONS.

Respondents attempt to bolster their arguments by relying on procedural rules developed by this and lower federal and state courts to adjudicate cases involving "physical invasions" of private property under the Takings Clause. (Brief in Opposition at 14-17.) In doing so, however, respondents overlook the fact that those principles are simply inapplicable to cases – such as the present litigation – involving facial claims of unconstitutional takings of property attributable to purely regulatory action.

This Court recently underscored that point in *Yee v. City of Escondido*, 503 U.S. 519, 112 S.Ct. 1522 (1992). There the Court unanimously held that principles applicable to physical takings claims could not be simply imported into the distinct rules pertaining to regulatory takings law, given the critical analytical distinctions between the two doctrines. (112 S.Ct. at 1526.)

Respondents' reliance on cases such as *United States v. Dickinson*, 331 U.S. 745 (1947) and *Pierpont Inn, Inc. v. State of California*, 70 Cal.2d 282, 449 P.2d 737, 74 Cal.Rptr. 521 (1962) is therefore fundamentally misplaced, inasmuch as those decisions deal with *physical* invasions of property.

In recent years, both state and federal courts have rejected the same argument posed by respondents herein:

that landowners should not be required to pursue their regulatory takings claims until the government conduct precipitating the claim has "sufficiently stabilized." The California Supreme Court expressly and unanimously rejected application of this theory to a regulatory takings case in *Hensler v. City of Glendale, supra,* 8 Cal.4th at 21-28, 876 P.2d at 1057-1061. (See also, *Patrick Media Group, Inc. v. California Coastal Commission,* 9 Cal.App.4th 592, 614-615, 11 Cal.Rptr.2d 824, 838 (1993) (finding *Dickinson* and *Pierpont Inn* inapposite to regulatory takings cases).) Federal courts have taken the same view, expressly rejecting the notion Respondents advance here. (*DeAnza Properties X, Ltd v. County of Santa Cruz,* 936 F.2d 1084, 1086-1087 (9th Cir. 1991); *Ocean Acres Ltd. Partnership v. Dare County Bd. of Health,* 707 F.2d 103, 105-106 (4th Cir. 1983).) And it is worthy of note that respondents' "sufficiently stabilized" theory is particularly inappropriate where – as here – they have chosen to pursue a *facial* takings claims to the regulations at issue. Under such circumstances, it is particularly unnecessary and nonsensical to defer litigation for some indeterminate period, since the legality of the regulations can be clearly measured at the time of their enactment. (See *Keystone Bituminous Coal Ass'n v. DeBenedictis,* 480 U.S. 470, 494-497 (1987) (discussing facial regulatory takings challenges generally).)

IV.

RESPONDENTS MISPERCEIVE *WILSON v. GARCIA'S* APPLICABILITY TO THE PRESENT CASE.

Respondents' Brief in Opposition betrays a fundamental misunderstanding of *Wilson v. Garcia*, 471 U.S. 261 (1985), and that decision's application to the present litigation. First, without addressing or even mentioning the authorities cited in the Petition, respondents baldly maintain that the Tahoe Regional Planning Compact does not qualify as federal law. (Brief in Opposition at 18, 19.) But that claim is patently without merit, as even a cursory examination of this Court's precedents reveal. (E.g., *Culyer v. Adams*, 449 U.S. 433, 439-440 (1981); *Petty v. Tennessee-Missouri Bridge Comm.*, 359 U.S. 275, 278-279 (1959).)

Second, *Garcia* instructs that choice of the applicable statute of limitations to be applied in litigation brought under 42 U.S.C. section 1983 is a matter of *federal* law; only when federal law fails to establish a particular limitations period should the federal courts borrow a limitations period from the law of the state in which the court is located. (471 U.S. at 266-267; see also, *DelCostello v. Teamsters*, 462 U.S. 151, 171-172 (1983) (declining to apply state statute of limitations period in face of federal limitations period which better reflected interests likely advanced by Congress).) (Notably, the Brief in Opposition does not take direct issue with these principles; rather, respondents completely ignore them, choosing instead to cite to recent Eleventh Amendment decisions of this Court having no relevance to the statute of limitations question here at issue.)

Third and finally, since the 60-day limitations period contained in the Tahoe Regional Planning Compact indisputably constitutes federal law (see *supra*), the Ninth Circuit grievously erred by inexplicably failing to apply that provision to respondents' section 1983-based regulatory takings claim. Such an application is directly mandated under a proper construction of *Garcia*, contrary to respondents' apparent belief.[3]

---

[3] Respondents further claim – for the first time before this Court – that all or portions of their inverse condemnation claims are subject to a *three-year* limitations period under *Garcia*. Brief in opposition at 19-20. This belated assertion is equally spurious. First, Respondents' reliance on *Gibson v. United States*, 781 F.2d 1334 (9th Cir. 1986) and *Mason v. Schaub*, 564 F.2d 308 (9th Cir. 1977) seems misplaced, given this Court's subsequent "retroactivity" rulings in *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 534-544 (1991) and *Harper v. Virginia Dept. of Taxation*, ___ U.S. ___, 113 S.Ct. 2510, 2517 (1993). (On the general subject of *Garcia*'s retroactivity, see Schwartz & Kirklin, *Section 1983 Litigation: Claims, Defenses and Fees* § 12.10 (John Wiley & Sons, 2d ed.) (1994 Supp.).) Moreover, Respondents' bald statement that "it is undenied" that the operative statute of limitations for their section 1983 claim is three years (Brief in Opposition at 20, n.9) is simply untrue. To the contrary, Petitioners have consistently maintained throughout the course of the litigation that the Tahoe Regional Planning Compact's 60-day statute of limitations, ratified in 1980 by Congress as part of the Compact, is the proper limitations period to be applied in this case. Respondents themselves did not take issue with that point until they argued, for the first time in the Ninth Circuit, that a limitations period from some other source should be applied instead.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

DANIEL E. LUNGREN,
Attorney General of the
State of California
RODERICK E. WALSTON,
Chief Assistant Attorney
General
JAN S. STEVENS,
Assistant Attorney
General
*RICHARD M. FRANK,
Supervising Deputy
Attorney General
CARLA CARUSO,
Deputy Attorney General

Attorneys for Petitioner
State of California

*Counsel of Record

FRANKIE SUE DEL PAPA,
Attorney General of
Nevada
KENT B. HANSON,
Deputy Attorney General

Attorneys for Petitioner
State of Nevada

R.J. NICOLLE, ESQ.
SUSAN E. SCHOLLEY, ESQ.
Tahoe Regional Planning
Agency

Attorneys for Petitioner
Tahoe Regional Planning
Agency

March, 1995